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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-224

JAN 2 1972
MICHAEL RODAK, JR., CLERK

HAROLD R. SWENSON, Warden,
Missouri State Penitentiary,

Petitioner,

v.

JAMES WILLIAM STIDHAM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

I. Did the Court of Appeals err in failing to find that the statement of the accused was involuntary as a matter of law?

Malloy v. Hogan, 378 U.S. 1 (1963)
Davis v. North Carolina, 384 U.S. 737 (1966)
Watts v. Indiana, 338 U.S. 49 (1949)
Clewis v. Texas, 386 U.S. 707 (1967)

Brooks v. Florida, 389 U.S. 413 (1967)
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II. Did the Court of Appeals correctly find that the procedure used in Missouri trial courts in 1955 for testing the competency of a confession did not meet the minimal standards of *Jackson v. Denno*?

Jackson v. Denno, 378 U.S. 368 (1964)
Sims v. Georgia, 385 U.S. 538 (1966)
Lego v. Twomey, Sup. Ct. No. 70-5037 (Jan. 12, 1972)
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III. Did the Trial Court as well as the subsequent reviewing courts fail to make a finding with "unmistakable clarity" that the accused's statement was voluntary?

Jackson v. Denno, 378 U.S. 368 (1964)
Sims v. Georgia, 385 U.S. 538 (1966)
Desist v. United States, 394 U.S. 244 (1968)

IV. Did the United States Court of Appeals properly exercise its authority in allowing Stidham to appeal his second habeas corpus application after an appeal on his first application had been dismissed without prejudice?

Title 28 U.S.C. Section 2253

STATEMENT

While petitioner's statement of the case does not constitute a misstatement of the evidence, it is replete with irrelevant detail regarding the procedural history of this case, and inflamatory descriptions of the "numerous fractures, punctures and wounds" of the victim and the nature of the alleged attack (Pet. Br. 16-19). References to such testimony as that alleging that the victim was "begging, hollering and

pleading for his life" (Pet. Br. 19) have absolutely no bearing on the issues before this Court and appear to be a rather unfortunate attempt to becloud the undisputed factual data pertaining to the alleged confession. The issues before this Court revolve solely around the background and circumstances under which the statement of James Stidham was elicited. Accordingly, respondent will direct himself initially to the undisputed evidence concerning the background information, secondly to the disputed testimony concerning the actual method by which the statement was elicited and recorded and finally to action of the trial court in dealing with the issue of voluntariness.

A. UNDISPUTED EVIDENCE

From May, 1952, until January, 1953, James Stidham was confined with the regular prison population at Missouri State Penitentiary. However, in January, 1953, he was placed in solitary confinement based on charges that he had attempted an escape (A. 610-612). Stidham remained in solitary confinement for approximately 20 months until September, 1954 (A. 610). During the first 18 months, Stidham testified, he was confined in a cell five feet by seven feet with furnishings consisting of a wash basin, toilet and steel bunk with a straw tick as a mattress (A. 611). He stated that the area of his confinement was infested with cockroaches, rodents and pigeons and that the ventilation was so poor that on several occasions he passed out because of the heat (A. 612). Stidham further testified that throughout these 18 months he was denied the opportunity to consult with friends, attorney or priest, was not allowed to converse with persons other than prison guards, and was denied access to recreation, fresh air and religious services (A. 611, 612).

During the last two months, from July 12, 1954, until September 24, 1954, Stidham was confined on "Death Row" under substantially the same solitary confinement conditions he had previously undergone with the exception, he stated,

that on "Death Row" he was not provided with a bunk, but slept on a straw tick on the floor (A. 612, 613). Stidham testified that during the entire 20-month period he was permitted to leave solitary confinement on only one occasion (for a court appearance) and was beaten at least seven times (A. 613).

It was while Stidham was confined on "Death Row," in late September, 1954, that the prison riot occurred, during the course of which Stidham was released from his cell. When Stidham was returned to his cell on September 23, 1954, after the riot had ended, he stated, the entire floor was covered with three to four inches of water and the straw tick had become waterlogged to the extent that the only method by which he could sleep was to sit on the commode (A. 615).

Stidham testified that immediately after being returned to his cell he was questioned about his participation in the alleged murder but denied any knowledge of it (A. 615). For the next several days, he said, he was questioned at length at least 25 times and was threatened with physical harm if he did not admit participation in the alleged murder (A. 324, 616). Stidham testified that during this time he attempted to contact a lawyer by addressing a registered letter to his parents but that the letter was not permitted to be mailed (A. 620). He said he also attempted to obtain a lawyer by bribing several guards, but was not able to do so (A. 620). From the time the riot ended on September 23, 1954, until the morning Stidham was brought before the Cole County Magistrate on September 29, 1954, Stidham stated, he was not provided with food of any kind (A. 621).

The statement in question was elicited on September 27th, three days after the riot had ended and after approximately an hour of interrogation at the "field house" which was located some distance from Stidham's cell on "Death Row" (A. 291, 310, 428). During the interrogation there were present at least six police officers who were wearing side arms (A. 299, 304). Stidham initially denied any knowledge of the alleged murder, but subsequently signed the statement in issue (A. 305, 310).

The circumstances by which he was persuaded to make the statement are disputed and will be treated in the next section, but it is not disputed that Stidham was at no time advised of his constitutional rights (A. 675). It is also undisputed that the statement signed by Stidham is incorrect as to his age (it states that he was 25 when in fact he was 28) (A. 327, 421, 430), his residence (it states that he is from Kansas City although he had never lived there) (A. 676), and his prior convictions (it states that he had three, when in fact he had only one) (A. 616, 674).

Subsequent to signing the statement Stidham testified that he was again placed in solitary confinement in a barren cell (A. 328, 432) and two days later, on September 29th, was taken before the Cole County Magistrate for arraignment on the murder charge (A. 433). At that time he shouted in open court his demand for a lawyer, but was not provided with one, nor was he allowed to call his own attorney (A. 329). He testified that his reason for desiring a lawyer at that time was to obtain an immediate statement from a state witness who had failed to identify him as one of those participating in the alleged murder, and also to examine his physical condition since his body was then "a mass of bruises" and since he had lost 25 pounds of weight during the six-day period since the riot had ended (A. 328, 622). In the absence of counsel a plea of not guilty was entered, however, a grand jury subsequently returned an indictment and the information was dismissed. Stidham was then rearraigned on the indictment and counsel was appointed to represent him. Stidham said he first saw his appointed lawyer about a month later (A. 623).

B. DISPUTED TESTIMONY

The testimony regarding the immediate circumstances under which the statement was elicited on September 27th at the "field house" is quite divergent. Stidham testified that he was placed in a chair, handcuffed behind his back, that a belt was placed behind his ankles and a heavy coat around him

and that he was then questioned about the alleged murder (A. 325, 428). When he denied any involvement, Stidham testified, the officers took a rope, tied it around his cuffed hands and raised him about six inches off the ground (A. 325, 429). He stated that the questioning continued for about 15 minutes while he was suspended in the air, after which he was lowered and told to sign a statement to be dictated to him (A. 326, 429). When he refused, he said, he was again lifted off of the floor and hit with corkball bats (A. 327, 430). He stated that because of his weary condition, and the fact that he was at that time semiconscious, he agreed to sign a statement which was then dictated to him by the officers (A. 327, 430).

The officers present at the September 27th interrogation denied that there were any threats or physical abuse, and contended that Stidham voluntarily admitted to committing the murder with a six-inch kitchen knife (A. 657, 662).

C. TRIAL COURT PROCEEDINGS

During the course of the trial, Stidham's counsel moved the court "to conduct a preliminary examination" and "to inquire into the voluntariness of the statement, and to determine whether the statement was given voluntarily, either the oral or the written statement" (A. 289). The Court replied as follows:

> ". . . and the defendant proposes to show by cross-examination or by its own testimony the involuntariness of the statement?" (A. 289)

The Court in granting the motion for the hearing stated:

> ". . . if the defendant then has any testimony concerning the voluntariness of the confession, he may take the stand or offer such testimony as he wishes to offer, and then at that time the Court will pass upon the admissibility of the statement into evidence, and then the Jury will be recalled, and, of course, parties will have the same opportunity of presenting the same matter before the Jury. With that statement, you may proceed." (A. 291)

Thereafter the evidentiary hearing was held and the Court stated as follows: (at A. 348)

> ". . . it is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, subject, of course, to any attacks as to its credibility by the defendant. The defendant has, of course, the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opinion that upon the evidence that has been offered before the Court and outside of the hearing of the Jury, that the statement is and should be admissible in evidence, subject to further examinations of the witnesses which might be conducted so we may proceed with Sergeant Little, as to his identification before the Jury of the statement in question, Exhibit 16 and 16-1.
>
> MR. HENNELLY: In other words, the Court is overruling my motion, and request of the Court to hold as a matter of law, that those statements were involuntary, is that right?
>
> THE COURT: That is right. Mr. Sheriff will you bring the Jury back in?"

Subsequently, both the written and oral statements of Stidham were received in evidence over the objections of Stidham's counsel.

SUMMARY OF ARGUMENT

According to the "Questions Presented" section of petitioner's brief, petitioner takes issue with the decision of the Eighth Circuit on two substantive points pertaining to the admissibility of Stidham's statements under the requirements of *Jackson v. Denno*, 378 U.S. 368, (a) That the law in Missouri at the time of Stidham's trial did not comply with the *Jackson* requirements and (b) That the trial court did not make an affirmative finding of voluntariness as required by *Jackson*. Additionally, petitioner argues that the Eighth Circuit abused its discretion by allowing Stidham to appeal

from the denial of a petition for habeas corpus after he had once voluntarily dismissed an appeal.

In addition to answering these contentions, respondent will show that the only error committed by the Eighth Circuit was its failure to find that Stidham's statement was involuntary as a matter of law. Accordingly, respondent's argument will be addressed first to the voluntariness of the confession, secondly to the *Jackson v. Denno* points raised by petitioner and lastly to the contention that the Eighth Circuit abused its discretion in allowing the appeal.

As to the voluntariness of the statement, this Court has repeatedly held, under conditions analogous to the undisputed evidence in the instant case, that the totality of the circumstances rendered the confession involuntary and inadmissible.

Decisions of the Missouri Courts both prior to and subsequent to the Stidham trial, indicate quite clearly that the procedure then utilized did not meet the requirements of the Fourteenth Amendment as set out in *Jackson v. Denno.*

Neither the trial court, nor any subsequent reviewing court, made a finding with "unmistakable clarity" that Stidham's statement was voluntarily made as is required under the ruling in *Sims v. Georgia.*

A finding that a confession "is not involuntary as a matter of law" is not an actual, reliable and clear cut determination that the confession is voluntary as is required by this Court's holding in *Jackson v. Denno.*

Title 28, United States Code, Section 2253, provided the Court of Appeals with both the authority and the duty to review the denial of Stidham's second petition for habeas corpus.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN FAILING TO FIND THAT THE STATEMENT OF THE ACCUSED WAS INVOLUNTARY AS A MATTER OF LAW

The Court of Appeals reviewed the evidence pertaining to the background and circumstances under which Stidham's confession was elicited and concluded as follows: (at A. 771)

> "We believe that the above version of the facts, if true, requires the conclusion that the confession was an involuntary one. See, *Brooks v. Florida*, 389 U.S. 413 (1967); *Watts v. Indiana*, 338 U.S. 49 (1949); *Brown v. Mississippi*, 297 U.S. 278 (1936).
>
> We emphasize that we do not decide or intimate that the allegations are true. It is not the task of the federal court to do so in state habeas corpus matters:
>
> '. . . The appropriate remedy when a federal court finds a *Jackson v. Denno* error in a prior state proceeding is to allow the State a reasonable time to make an error-free determination on the voluntariness of the confession at issue. . . .'
>
> *Sigler v. Parker*, supra at 484.
>
> We only note, as did the United States District Court, that we have examined the transcripts and other relevant materials and have found that several of Stidham's allegations have not been contradicted in the record."

In light of its decision to remand the case for further proceedings, therefore, the court declined to determine whether, as a matter of law, the statement was involuntary. The court did, however, recognize that a portion of the evidence showing involuntariness was uncontradicted. As indicated in the statement of the case, such evidence established that:

> A. Prior to giving a statement, Stidham had been confined in solitary confinement continuously for 20 months (A. 610).

B. The solitary confinement had for the most part been in a cell measuring five feet by seven feet with furnishings consisting of a wash basin, toilet, steel bunk and straw tick in an area infested with cockroaches and rodents, and with ventilation so poor that Stidham passed out on several occasions (A. 611).

C. During the 20-month period of solitary confinement, Stidham was not permitted to converse with persons other than prison guards, nor was he permitted to participate in exercise, recreational or religious activities (A. 612).

D. During the four days prior to giving the statement, Stidham was confined in a cell with several inches of water on the floor and could sleep only by sitting on the commode since his straw tick was waterlogged (A. 615).

E. During the four days prior to giving the statement, he was questioned at length at least 25 times, was threatened with physical harm, and was denied contact with a lawyer (A. 438, 616).

F. From the period beginning four days before the statement was given and ending two days after the statement was given, Stidham had nothing to eat (A. 621).

G. The statement was elicited under surveillance of at least six armed police officers in an isolated "field house" after at least one-half hour of interrogation during which Stidham denied any participation in the alleged murder (A. 304, 305, 618).

H. The signed statement is erroneous in three material respects pertaining to the background of the accused: His age, his residence and his prior convictions (A. 327, 421, 430, 475, 676).

I. After making the statement Stidham was returned to solitary confinement and was arraigned two days later without the benefit of counsel even though he shouted in open court his desire for a lawyer (A. 328, 329, 622).

J. Stidham was at no time either before, during or after the interrogation advised of his constitutional right to remain silent, to have the assistance of counsel, or to terminate the interrogation (A. 675).

Testimony pertaining to many of these facts was elicited at the trial and was uncontradicted. Substantially the same testimony was elicited at the hearing on the motion to vacate several years later and it remained uncontradicted. To this date the State has steadfastly resisted any additional proceedings concerning the voluntariness issue wherein it would have the opportunity to rebut any of the above evidence which could be rebutted. Consequently, we are faced with a situation similar to that in *Sims v. Georgia*, 389 U.S. 404 (1967) in which the Court commented: (at 385 U.S. 406)

> "The state had every opportunity to offer the police officers, whose failure to testify had already been commented upon here to contradict petitioner's version of the events. Its failure to do so when given a second chance lends support to the conclusion that their testimony would not, in fact, have rebutted petitioner's."

Although it is recognized that the strict requirements of the *Miranda* decision are not enforced retroactively, and were, therefore, not applicable to this case, *Johnson v. New Jersey*, 384 U.S. 719 (1966), the Fourteenth Amendment nevertheless required that the statement not be admitted unless it were actually found to be voluntary. As the Court stated in *Malloy v. Hogan*, 378 U.S. 1, 4 (1963):

> ". . . today the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897, when, in *Bram v. United States*, 168 U.S. 532, the Court held that "[i]n criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in

any criminal case to be a witness against himself.' " Id., at 542. Under this test, the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was "free and voluntary: that is, (it) must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . ." Id., at 542-543; see also *Hardy v. United States,* 186 U.S. 224, 229; *Wan v. United States,* 266 U.S. 1, 14; *Smith v. United States,* 348 U.S. 147, 150. In other words the person must not have been compelled to incriminate himself. We have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed. *Haynes v. Washington,* 373 U.S. 503."

The Court has frequently held that in determining whether a confession is voluntary it is necessary to look at all of the attendant circumstances, including mental as well as physical influences. *Garrity v. New Jersey,* 385 U.S. 493 (1967); *Davis v. North Carolina,* 384 U.S. 737 (1966); *Haynes v. Washington,* 373 U.S. 503 (1963); *Blackburn v. Alabama,* 361 U.S. 199 (1960); *Watts v. Indiana,* 338 U.S. 49 (1949); *Chambers v. Florida,* 309 U.S. 227 (1940).

For example, in *Watts v. Indiana, supra,* the accused had been confined for five and one-half days, much of the time in solitary confinement. During this time, he was interrogated by relays of police officers. The Court in holding a confession obtained under such circumstances inadmissible stated: (338 U.S. at 53)

> "Disregard of rudimentary needs of life – opportunities for sleep and a decent allowance for food – are also relevant, not as aggravating elements of petitioners treatment, but as part of the total situation out of which his confessions came and which stamped their character."

* * * * *

> "When a suspect speaks because he is overborne it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and is, therefore, the reverse of voluntary."

Similarly in *Turner v. Pennsylvania,* 338 U.S. 62 (1949), where the accused had been held for five days without contact with counsel or friends and without being advised of his constitutional rights, the Court held that the statement elicited under the circumstances was not admissible.

A case with facts somewhat analogous to those in the instant case is *Davis v. North Carolina, supra.* Davis had been held for sixteen days in solitary confinement in a cell measuring six feet by ten feet, containing a steel bunk, mattress, drinking fountain and commode. In the instant case, the uncontradicted evidence is that Stidham had been confined in solitary confinement for twenty months under conditions far less comfortable than those to which Davis was subjected. The evidence indicated in the *Davis* case that for the sixteen days during which he was held, Davis was seen only by police officers, was subjected to several periods of interrogation and lost some fifteen pounds of body weight. As indicated in the statement of the case, the evidence is uncontradicted as to the existence of similar factors in the instant case, including the defendant's substantial loss of weight (A. 328).

Holding that Davis' confession was inadmissible, the Court addressed itself to each of the above mentioned factors.

As to the solitary confinement:

> "The instruction not to permit anyone access to Davis and not to allow him to communicate with the outside world can mean only that it was the determination of his custodians to keep him under absolute control where they could subject him to questioning at will in the manner and to the extent they saw fit, until he would confess. 339 F.2d 780.

> Moreover, the uncontested fact that no one other than the police spoke to Davis during the 16 days of detention and interrogation that preceded his confessions is a significant factor in the determination of voluntariness." (384 U.S. at 745)

As to the lack of food:

> "We may readily agree that the record does not show any deliberate attempt to starve Davis, compare *Payne v. Arkansas*, 356 U.S. 560 (1958), and that his diet was not below a minimum necessary to sustain him. Nonetheless, the diet was extremely limited and may well have had a significant effect on Davis' physical strength and therefore his ability to resist. There is evidence in the record, not rebutted by the state, that Davis lost 15 pounds, during the period of detention." (384 U.S. at 746)

As to the multiple periods of questioning:

> "The facts established on the record demonstrate that Davis went through a prolonged period in which substantial coercive influence were brought to bear upon him to exort the confessions that marked the culmination of police efforts. Evidence of extended interrogation in such a coercive atmosphere has often resulted in a finding of involuntariness by this Court; e.g., *Culombe v. Connecticut*, 367 U.S. 568 (1961); *Fikes v. Alabama*, 352 U.S. 191 (1957); and *Turner v. Pennsylvania*, 338 U.S. 62 (1949). We have never sustained the use of a confession obtained after such a lengthy period of detention and interrogation as was involved in this case.
>
> "The fact that each individual interrogation session was of relatively short duration does not mitigate the substantial coerive effect created by repeated interrogation in these surroundings over 16 days. So far as Davis could have known, the interrogation in the overnight lock-up might still be going on today had he not confessed." (384 U.S. at 752)

Moreover, the Court in *Davis, supra*, while noting that the *Miranda* requirements would not be applied retroactively,

held that the failure to warn Davis of his constitutional rights was a significant factor to be considered in determining whether the confession was voluntary. See also *Haynes v. Washington, supra; Culombe v. Connecticut,* 367 U.S. 568 (1961).

Another case quite analogous to the one in issue is *Clewis v. Texas,* 386 U.S. 707 (1967), in which the Court again viewed the *Miranda* requirements as relevant factors in determining the voluntariness issue even though they were not strictly applied retroactively. The Court in *Clewis* held that the lack of *Miranda* warnings, coupled with a long period of custody, intermittent interrogation, inadequate food and lack of sleep rendered the confession inadmissible.

Still another similar case is *Brooks v. Florida,* 389 U.S. 413 (1967). Brooks, accused of participating in a prison riot, spent fourteen days in a barren punishment cell, during which time he was provided with no clothing and little food. A confession was then elicited and he was returned to his cell for another twenty days. Finding that the confession was involuntary and inadmissible, the Court commented as follows:

> "The record in this case documents a shocking display of barberism which should not escape the remedial action of this court. Accordingly, we reversed the judgment below."

In view of the abundance of pronouncements from the Court condemning as involuntary statements elicited under circumstances similar to those indicated by the uncontested evidence in the instant case, it is difficult to perceive how Stidham's statement can be viewed as voluntary. The lengthy period of solitary confinement, in itself, must have had a substantial impact upon his willpower. While petitioner may argue that such confinement was necessary to the security of the prison, such argument is simply not pertinent to the issue at hand. A similar argument was met by the Court of Appeals in *Townsend v. Henderson,* 405 F.2d 324 (6th Cir. 1968), which involved a prisoner who had been placed in solitary

confinement for participating in a prison riot and who was subsequently interrogated. The accused testified that his cell contained only the most primitive sanitary facilities and a board for a bed, that he was not provided with clothing, and that the only nourishment he had was bread and water. The Court noted that: (at 327)

> "State witnesses did not attempt to describe the conditions of Terry's confinement, so we must accept his testimony on this subject as true. Moreover, since solitary confinement for prisoners is considered additional punishment, it is common knowledge that the solitary cells are not designed for comfort."

Accordingly, the court held that the conditions of confinement in themselves, rendered the confession involuntary. In rejecting the argument that such confinement was necessary to maintain prison discipline, the court stated: (at 328)

> "It has been suggested that Terry had committed a very grave offense and that the maintenance of prison discipline required him to be placed in solitary confinement. Perhaps so, but that is not the question before us. We reach our conclusion in regard to Terry's confession without consideration of his quilt in the riot and without consideration of the methods utilized by prison authorities to maintain discipline. Those methods are not described in this record, except incidentally as they affect the prisoner Terry. The solitary confinement of prisoners as a means of enforcing discipline is a subject for study by penologists and sociologists. But, the admissibility in a judicial proceeding of a confession extracted from a prisoner by his jailer while he is in solitary confinement is a question for the courts. That question is squarely before us here and we hold that Terry's confession should not have been used against him."

Whatever may have been the efficacy of confining Stidham under the conditions described insofar as prison discipline is concerned, such conditions clearly had a substantial coercive effect on the man insofar as his statement is concerned. It is submitted that based on the record before the Court, and

common knowledge of human behavior, no conclusion is possible other than that the statement was a result of coercion. Accordingly, under the decisions cited above, the statement should be held involuntary and the conviction ordered vacated.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT THE PROCEDURE USED IN MISSOURI TRIAL COURTS IN 1955 FOR TESTING THE COMPETENCY OF A CONFESSION DID NOT MEET THE MINIMAL STANDARDS OF *JACKSON v. DENNO.*

In finding that the trial court in the instant case did not affirmatively determine Stidham's statement to be voluntary before submitting it to the jury as required by *Jackson v. Denno,* 378 U.S. 368 (1964), the Court of Appeals looked to the case law in Missouri at the time of the trial and concluded as follows: (A. 767)

> "Our examination of the Missouri case law convinces us that a trial court had and frequently used the right to submit the question of voluntariness to the jury without a prior determination that the confession was voluntary."

The Court then goes on to set out pertinent excerpts from the Missouri cases of *State v. Gibilterra,* 116 S.W.2d 88, 94 (Mo. 1938); *State v. Sanford,* 193 S.W.2d 37, 38 (Mo. 1946), and *State v. Laster,* 293 S.W.2d 300, 304 (Mo. 1956), each of which states explicitly that the question of voluntariness is to be determined by the Jury unless the contrary appears so conclusively that the confession must be held involuntary as a matter of law. Additionally, the Court of Appeals cited the cases of *State v. Bridges,* 349 S.W.2d 214 (Mo. 1961); *State v. Barnett,* 338 S.W.2d 853 (Mo. 1960); *State v. Falbo,* 333 S.W.2d 279 (Mo. 1960); *State v. Statler,* 331 S.W.2d 526 (Mo. 1960); *State v. Phillips,* 324 S.W.2d 693 (Mo. 1959); *State v. Bradford,* 262 S.W.2d 584 (Mo. 1953); *State v. Cochran,* 203 S.W.2d 707 (Mo. 1947); *State v. Ellis,* 193 S.W.2d 37 (Mo. 1946).

It would be unduly repititious to quote at length from the above cases. However, a reading of the Eighth Circuit's opinion, as well as a cursory review of the cases cited will indicate that the Court's position is well taken.

In taking issue with the Appellate Court's conclusion drawn from a review of the above cases, petitioner directs the Court's attention to five cases from the previous century wherein the Missouri Courts simply state that the preliminary question of voluntariness is a matter of law to be determined by the court rather than the jury.[1] Disregarding for a moment the age of these cases as diminishing their validity at the time of Stidham's trial, they nevertheless state nothing of a *requirement* that a judge make a positive determination of voluntariness before submitting the matter to the jury. Petitioner also cites *State v. Wooley*, 115 S.W. 417 (Mo. 1908), and *State v. Wilson*, 122 S.W. 671 (Mo. 1909), for the proposition that the question of "competency of the evidence" was regarded as one for the judge (Pet. Br. 39). Respondent takes no issue with this general proposition, however, neither of these cases says anything of a *requirement* that the judge positively and affirmatively determine a confession to be voluntary before he rules it to be "competent" evidence and submits it to the jury.

While petitioner quotes at length from the opinion in *State v. Tharp*, 64 S.W.2d 249 (Mo. 1933), the quoted portion itself appears to contradict petitioner's argument. The court stated (at 255) and petitioner quoted (at Pet. Br. 40):

> "All the witnesses for the state say the defendant was advised he could have counsel and that whatever he said could be used against him. In these circumstances certainly the trial court did not err in leaving it to the jury to say whether the written confession then made was voluntary or not. . . . yet we think the

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[1]Petitioner cites *State v. Brown*, 73 Mo. 631 (1881); *State v. Hopkirk*, 84 Mo. 378 (1884); *State v. McKenzie*, 45 S.W. 1117 (Mo. 1898); *State v. Patterson*, 73 Mo. 695 (1881), and *Hector (a Slave) v. State*, 2 Mo. 166 (1829).

> proof here was amply sufficient to make it a jury issue whether the confession in the prosecuting attorney's office was voluntary and independent of any alleged influence exerted on the boys in Trenton the preceding evening."

The Missouri court in *Tharp* thereby approves the procedure whereby the trial court defers to the jury where there is conflicting evidence on the question of voluntariness.

Similarly, the opinion in *State v. Gibilterra*, 116 S.W.2d 88 (Mo. 1938), is strangely quoted at length in petitioner's brief (at Pet. Br. 41), although it undercuts petitioner's contention that Missouri procedure has always required the trial judge to make an initial determination of voluntariness. The portion quoted by petitioner reads in part as follows:

> "At the hearing if the evidence is conflicting and substantial the court *may* determine the mixed question of law and fact by weighing the evidence; and if convinced one way or the other he should rule accordingly."
>
> * * *
>
> "On the other hand, *when there is substantial conflicting evidence and the question is close it is better to refer the underlying issue to the jury* than to exclude the confession . . ." (Emphasis added)

The court in *Gibilterra* holds, therefore, that a trial judge is not required to refer the question of voluntariness to the jury in the face of conflicting evidence, but neither is he required to make a determination himself. If "the question is close," he may refer it to the jury. In fact the court recommends that, under such circumstances, it is better to refer the underlying issue of voluntariness to the jury. As the Eighth Circuit noted, the *Gibilterra* opinion goes on to state that the voluntariness of a confession "is a jury question unless it is involuntary character so conclusively appears that it must be held involuntary as a matter of law." (A. 768)

The same judicial mandate appears in *State v. Bradford*, 262 S.W.2d 584 (Mo. 1953), also quoted at length by petitioner: (at Pet. Br. 42, 43)

> "On the other hand, when there is substantial conflicting evidence and the evidence is close, it is better to refer the issue to the jury than to exclude the confession upon the preliminary hearing."

In resting his argument on such pronouncements, it is apparent that petitioner has misconstrued this Court's holding in *Jackson v. Denno*, 378 U.S. 368 (1964). Petitioner argues in effect that if a Missouri court finds that there is substantial conflicting evidence on the issue of voluntariness or that the question is close, and accordingly refers the matter to the jury, then the court has satisfied the requirements of *Jackson*. The decision in *Jackson*, however, places squarely on the trial court[2] the responsibility of making an actual and independent determination as to voluntariness.

In *Jackson, supra*, the Court condemned the New York procedure whereby the trial court conducted a preliminary inquiry into the voluntariness of a confession and excluded it from consideration by the jury only if the evidence was overwhelming as to its voluntariness. Under the condemned procedure, if the evidence presented "a fair question as to its voluntariness as were certain facts bearing on the issue are in dispute or where reasonable men could differ," then the judge was required to refer the issue to the jury. The fallacy of this procedure, the Court said, was that under some circumstances it was impossible to determine how the issue of voluntariness was finally resolved since the jury returned only a general verdict on the question of guilt or innocence. The principle upon which the *Jackson* decision turned is that a defendant is entitled to "a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined." Accordingly, the Court held that any procedure utilized:

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[2]It is recognized that *Jackson* permits the determination of voluntariness to be made by any fact finder other than the convicting jury (See 378 U.S. 391 N. 19). The term "trial court" is therefore used in this context to include such other independent fact finders.

> ". . . must, therefore, be fully adequate to insure a *reliable and clear cut determination* of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend" (378 U.S. at 391). (Emphasis added)

In *Sims v. Georgia,* 385 U.S. 538 (1966), the Court was even more explicit in stating the requirement of a "clear cut determination of voluntariness." The Court said: (385 U.S. at 544)

> "Although the judge need not make a formal finding of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with *unmistakable clarity.*" (Emphasis added)

More recently in *Lego v. Twomey,* No. 70-5037 (January 12, 1972), the Court, in holding that the prosecution must prove voluntariness only by a preponderance of the evidence rather than beyond a reasonable doubt, stated again the requirements of *Jackson:*

> "To reiterate what we said in *Jackson:* When a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear cut determination that the confession was, in fact, voluntarily rendered. Thus, the prosecution must prove by at least a preponderance of the evidence that the confession was voluntary."

It is abundantly clear, therefore, that a defendant is entitled to a *determination* as to whether or not the confession is voluntary. This requirement is not satisfied by a mere finding that there is "substantial conflicting evidence" or that "the question is close" so as to permit the judge to submit the issue to the jury. Neither is it satisfied by a finding that the evidence of involuntariness is not so overwhelming as to make the confession "involuntary as a matter of law." The judge must make a *determination* based on the preponderance of the evidence, he cannot pass this duty on to the jury.

A review of the Missouri cases cited by the Court of Appeals makes it equally clear that the Court was correct in stating that under Missouri law "a trial court had and frequently used the right to submit the question of voluntariness to the jury without a prior determination that the confession was voluntary." Consequently, Missouri law, at the time of the trial, did not meet the minimal standards set out in *Jackson v. Denno, supra,* and reiterated in *Sims v. Georgia, supra,* and *Lego v. Twomey, supra.*

The petitioner argues, citing *State v. Washington,* 399 S.W.2d 109 (Mo. 1966), that pre-*Jackson* Missouri procedure was "indistinguishable in legal effect" from the Massachusetts rule approved in *Jackson.* As the Court of Appeals noted, *State v. Washington* was decided after *Jackson* became law and directed itself to a Missouri standard which was different than that in effect in 1955. Moreover, the petitioner has overlooked one critical distinction between the pre-*Jackson* Missouri procedure and the Massachusetts procedure. Under the Massachusetts rule the judge is *required to make a positive determination* of voluntariness before submitting the matter to the jury, while under pre-*Jackson* Missouri procedure he could defer to the jury if the evidence presented a "close question." The Court in *Jackson* comments on the approved Massachusetts procedure as follows: (378 U.S. at 378 N. 8)

> "While no more will be known about the views of the jury than under the New York rule, the jury does not hear all confessions where there is a fair question of voluntariness, but only those which the judge actually and independently determines to be voluntary based on all the evidence. The judge's consideration of voluntariness is carried out separate and aside from the issues of the reliability of the confession and the quilt or innocence of the accused and without regard to the fact the issue may be again raised before the jury if decided against the defendant. *The record will show the judge's conclusions in this regard* and his findings upon the underlying facts may be expressed or ascertainable from the record." (Emphasis added)

The Court then notes (in Appendix A) that Missouri is among those States where it appears "unclear" whether the Massachusetts or New York procedure is used. It is submitted that the United States Court of Appeals for the Eighth Circuit, in the instant case, has now conducted an extensive review and analysis of Missouri case law and has concluded tha the procedure utilized in 1955 was not in compliance with the standards of *Jackson*. It is further submitted that this conclusion is correct in fact and in law and should not be disturbed by this Court.

III. NEITHER THE TRIAL COURT NOR ANY SUBSEQUENT REVIEWING COURT MADE A FINDING WITH "UNMISTAKABLE CLARITY" THAT THE ACCUSED'S STATEMENT WAS VOLUNTARY.

As petitioner correctly notes the holdings of the Court in *Jackson v. Denno, supra*, and *Sims v. Georgia, supra*, provide for two requirements on the question of voluntariness of a confession:

> "1. At some point in the proceedings a hearing on voluntariness must be had on defendant's request.
>
> "2. The judicial determination that a confession is voluntary must appear on the record." (Pet. Br. 48)

As to the second requirement, the Court in *Sims* states that:

> "Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity." (385 U.S. 544)

The Court of Appeals found that the above requirement was not met in the instant case, and, it is submitted that an analysis of the proceedings supports that conclusion, particularly when the comments of the judge are read in the context of the Missouri case law discussed in the previous section.

Upon the request of defense counsel for a preliminary examination on the issue of voluntariness, the Court inquired:

> "And the defendant proposes to show by cross examination or by its own testimony the involuntariness of the statement?" (A. 289)

The Court thereby implies that it will look to the defendant to carry the burden of proving involuntariness.

In granting the defense request the trial court stated:

> ". . . if the defendant then has any testimony concerning the voluntariness of the confession, he may take the stand or offer such testimony as he wishes to offer, and then at that time the court will pass on the admissibility of the statement into evidence, and then the jury will be recalled and, of course, parties will have the same opportunity of presenting the same matter before jury. With that statement, you may proceed." (A. 291)

Aside from the obvious pre-disposition indicated by the above statement, it will be noted that the Court proposed to "pass on the admissibility of the statement into evidence," not to make a determination as to its voluntariness. As noted in the previous section, Missouri cases then held that a statement was "admissible" if there was a "close question" as to its voluntariness.

At the conclusion of the evidenciary hearing, the Court stated: (at A. 348)

> ". . . (I)t is the Court's opinion that the matters concerning the statement should be offered in the presence of the Jury, subject of course to any attacks as to its credibility by the Defendant. The Defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the Jury, but it is the Court's opinion that upon the evidence that has been offered before the Court and outside of the hearing of the Jury, that the statement is and should be admissible in evidence, subject to further examinations of the witnesses which might be conducted . . .

"MR. HENNELLY (Defendant's counsel): In other words, the Court is overruling my Motion, and request of the Court to hold as a matter of law, that those statements were involuntary, is that right?

"THE COURT: That is right. . . ."

As it had previously proposed to do, the Court did not determine the voluntariness issue but simply ruled that the statement should be presented to the jury for its determination.

The only reference to a ruling on voluntariness was the gratuitous inquiry of defense counsel as to whether the Court was overruling his motion to find the statement involuntary "as a matter of law." The Court answered in the affirmative—that it was overruling his motion and did not find the statement involuntary *as a matter of law*. Such a ruling is understandable in light of the Missouri Rule that voluntariness was a jury question "unless its voluntary character so conclusively appears that it must be held to be involuntary as a matter of law." *State v. Gibilterra*, 116 S.W.2d 88, 94 (1938). However, it is not sufficient to satisfy the requirements of *Jackson* and *Sims* which require a positive determination of voluntariness and the requirement of *Lego* which holds that voluntariness must be found by at least a preponderance of the evidence.

Petitioner's argument that to find that a confession is "not involuntary as a matter of law" is to make a positive finding that it is "voluntary" ignores the respective weights of evidence required for each such finding.

A finding that a confession is "not involuntary as a matter of law" simply means (under the Missouri cases cited) that the evidence of involuntariness is not overwhelming. It may be that there is "substantial conflicting evidence," or that "the question is close." However, the finding that a confession is "voluntary" as required by *Jackson*, *Sims* and *Lego* means that the judge has weighed the evidence and has found that a preponderance of the evidence indicates voluntariness. There is no indication in the record of the instant case that the trial court made such a finding and, as noted, the clear

implication is that the trial court was simply following the procedure prescribed by Missouri case law.

Petitioner further argues that determinations of voluntariness were made by the Missouri Circuit Court at the hearing on Stidham's motion to vacate and by the Supreme Court of Missouri on appeal from denial of that motion. He concludes, therefore, that "there have been two post *Jackson* determinations as to voluntariness" (Pet. Br. 54). However, a review of the post trial proceedings referred to, indicates that in neither the hearing nor the appeal did the court rule directly on the factual issue of voluntariness. The State court considering Stidham's post trial motion refused to make an independent finding of voluntariness stating: (at A. 686)

> "As to subparagraph b concerning the averment that 'the overwhelming evidence was that the statement was involuntary because of coercion exerted on movant' this contention was raised and profusely litigated in *State v. Stidham, supra,* and the Court finds is no longer open to question here. *State v. Statler, supra; Crawford v. State, supra.*
>
> "It should be noted that the evidence concerning the issue of voluntariness was greatly conflicting and was to be resolved by the trial court in the first instance and the jury in the second having regard to the credibility of the witnesses. This issue should now be considered closed, and this Court finds it to be so."

Similarly, on appeal of the case, the Supreme Court of Missouri in *State v. Stidham,* 449 S.W.2d 634 (1970), did not itself make a finding that the statement was voluntary, but relied on its contention that the original trial court had made such a finding. The Supreme Court merely stated that the trial judge's "finding" was supported by the evidence. Nowhere does the Missouri Supreme Court make an *independent* finding of voluntariness.

Accordingly, it is submitted that neither the trial court nor any reviewing court has yet made a finding with "unmistakable clarity" that the statement was, in fact, voluntary.

As incidental to his argument that the *Jackson* requirements were met, petitioner asks the Court to hold first that habeas corpus does not lie to review the coercion aspect of a confession, and secondly that *Jackson* standards should not be applied retroactively. These points were not raised in the petition for writ of certiorari or in the "Questions Presented" section of petitioner's brief, and, therefore, are not subject to review. Rule 40(1)(d)(2). However, they are moot in any event. In *Desist v. United States*, 394 U.S. 244, 250, No. 15 (1968), this Court included *Jackson v. Denno, supra*, with *Gideon v. Wainwright*, 372 U.S. 335, and *Griffin v. Illinois*, 351 U.S. 12, in listing those constitutional decisions which require retroactive application, and in each of the numerous decisions cited in the first section of this argument the issue of voluntariness reached this Court through its review of action on a petition for habeas corpus.

In view of the foregoing, it is submitted that the Court of Appeals did not err in finding that the requirements of *Jackson v. Denno, supra*, have not yet been satisfied in the instant case. Unless this Court finds, as urged in the first section of respondent's argument, that Stidham's statement was involuntary as a matter of law, then the Court should affirm the action of the Court of Appeals in remanding the case for the necessary determination.

IV. THE UNITED STATES COURT OF APPEALS DID NOT ABUSE ITS DISCRETION BY ALLOWING STIDHAM TO APPEAL HIS SECOND HABEAS CORPUS APPLICATION AFTER AN APPEAL ON HIS FIRST APPLICATION HAD BEEN DISMISSED WITHOUT PREJUDICE.

Petitioner takes issue with the Court of Appeals' action in docketing Stidham's appeal, pointing out that the Court had previously refused to reinstate an appeal from a previous habeas corpus application which appeal had been dismissed without prejudice on Stidham's own application. In support of his argument, petitioner cites 28 U.S.C. 2254 (b); *Salinger v. Loisel*, 265 U.S. 224 (1924); *Smith v. Yeager*, 393 U.S. 122 (1968); and *Sanders v. United States*, 373 U.S. 1 (1963).

It is difficult to perceive how any of these authorities apply to petitioner's argument.

Title 28 U.S.C., Section 2254(b), pertains to the exhaustion of state remedies prior to filing an application for writ of habeas corpus in federal courts. Certainly there can be no contention that respondent has failed to exhaust state remedies. There is nothing under the section cited which could in any way be interpreted to limit the jurisdiction of an appellate court to review a decision of a district court.

Similarly, the decisions cited have absolutely no application to an appellate court's jurisdiction under these circumstances.

The Court in *Salinger v. Loisel, supra,* held that *res judicata* does not apply in habeas corpus proceedings, but that the District Court on second application may take into consideration the fact that a previous application has been denied. *Smith v. Yeager, supra,* and *Sanders v. United States, supra,* both reaffirmed the common law principle that *res judicata* has no application to habeas corpus proceedings, and in all three of the above cases the Court held that petitioner was in each instance entitled to a hearing on his second application. None of the opinions was addressed to the jurisdiction of the Appellate Courts to review decisions of the District Courts, and it is submitted that under Title 28 U.S.C. Section 2253 (quoted at P. 3 Petitioner's Brief) the Court of Appeals has the authority and duty to review any final order of a District Judge in a habeas corpus proceeding in which a Certificate of Probable Cause has been issued.

It is possible that petitioner is referring to Title 28 U.S.C. Section 2244 (b) when he argues that there has been an abuse of procedure in Stidham's successive habeas corpus petitions. However, that section states merely that a federal court "need not" entertain an application for writ of habeas corpus, if a previous application premised on the same issues has been denied. As the Court notes in the above cited cases, the decision to entertain the petition under such circumstances lies within the sound discretion of the court. In the instant case, the District Court did, in fact, entertain the

motion, but denied it. Clearly, the Appellate Court had both the jurisdiction and the duty to review the District Court's action.

CONCLUSION

For the reasons set forth in section one it is submitted that the Court should find the statement of the accused to be involuntary as a matter of law and should, therefore, reverse the judgment and conviction. However, in the event the Court does not so find, then it is submitted that for the reasons set forth in the remainder of this brief, the United States Court of Appeals for the Eighth Circuit properly assumed jurisdiction of this case and correctly applied the law set forth in *Jackson v. Denno, supra,* and *Sims v. Georgia, supra,* in finding that there had not been a determination made "with unmistakable clarity" that the accused's statement was voluntary and, therefore, the action of the Court of Appeals in reversing and remanding the case should be affirmed.

Respectfully submitted,

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